1986

The State of Utah v. Phillip G. Snyder : Brief of Appellant

Utah Supreme Court

Rodney G. Snow; Neil A. Kaplan; Clyde and Pratt; Attorneys for Appellant.
David L. Wilkinson; Attorney for Respndent.

IN THE SUPREME COURT OF THE STATE OF UTAH

1986 20470

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
vs.	:	
PHILLIP G. SNYDER,	:	
Defendant-Appellant,	:	Case No. 20470

APPEAL OF A JUDGMENT FROM THE
FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

HONORABLE GEORGE E. BALLIF, JUDGE

BRIEF OF APPELLANT

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Contents of Brief

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[ ] List of all Parties to proceeding below (unnecessary if all parties are named in caption)

[ ] Table of Contents with page references

[ ] Table of Authorities with page references (should be in alphabetical order) and parallel citations to the Utah Reporter for all pre-1974 cases

[ ] Statement of Issues Presented on Appeal (mandatory in all opening briefs; optional with responsive, reply, and rehearing briefs)

[ ] Statement of Facts with page references to the record (optional with reply and rehearing briefs)

[ ] Summary of Argument (optional with reply and rehearing briefs)

[ ] Argument

[ ] Conclusion (statement of relief sought by party)

[ ] Addendum (optional with responsive, reply, and rehearing briefs)

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STATEMENT OF ISSUES PRESENTED FOR REVIEW*

In the opinion of appellant, the following issues are presented:

1. Whether the convictions for theft by embezzlement must be reversed because there was insufficient evidence to support prosecution on that basis and prosecution for theft by deception was barred by the statute of limitations.

2. Whether the convictions must be reversed in this case because it is impossible to tell whether the jury found appellant guilty for offenses that were clearly barred by the statute of limitations.

3. Whether the trial court erred in denying appellant's motion for a new trial when appellant's new counsel did not have time to prepare an adequate record and the Court did not hold a evidentiary hearing on appellant's motion.

4. Whether the monetary portion of the sentence was illegal because the Court imposed a fine and restitution on appellant, when he had no financial ability to pay them, and it ordered restitution for persons not named as victims in the information.

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*This case has not previously been before this Court.

STATEMENT OF THE CASE

In an information filed on September 10, 1984, appellant was charged with nine counts of theft in violation of Utah Code Ann. §§76-6-404 and 76-6-412 (1953). At a jury trial held on September 17 through 24, 1984, before the Honorable George E. Ballif, appellant was found guilty on eight counts, and one count (count 9) was dismissed at the close of all the evidence.

On October 26, 1984, the Court sentenced appellant to a term of imprisonment for not less than one nor more than 15 years on each count, said counts to run concurrently with each other. Appellant was also ordered to pay a fine of $1,000.00 on each count and was further ordered to make restitution not to exceed $500,000.00 to the individuals who invested money in his project. The restitution amount was to be determined either (a) by agreement between the defendant and the Division of Corrections, (b) as determined through civil litigation, or (c) by further order of the court.

On November 5, 1984, appellant, though new counsel, filed a motion for new trial and a motion for additional time to submit a memorandum and procure the necessary evidence in support of his motion. The motion for new trial was denied by an order and decision of the Court dated February 8, 1985. A notice of appeal was filed on February 15, 1985.

INTRODUCTION

Beginning in the late summer of 1979, appellant pre-sold condominiums to be built on property he had recently acquired in Provo, Utah. At trial, the buyers claimed that appellant told them he would put their money in trust and use it only in the project. Appellant did not hold the buyers' money in trust pending construction, but immediately deposited their money in his general real estate operating account. Some of the buyers' money was used on the project, while most of it was used on appellant's unrelated ventures.

Testifying in his own defense, appellant acknowledged that he did not put the money in trust, nor did he ever intend to do so. Rather, appellant believed he was permitted to keep the buyers' money upon receipt, and use it for any purpose, because the earnest money agreements expressly stated the money was non-refundable. The project failed when appellant was unable to obtain construction financing.

STATEMENT OF FACTS

A. The Government's Case.

In late July 1979, appellant and Sunwest II Development Corporation entered into an agreement to purchase jointly from

Martensen Real Estate a parcel of undeveloped land known as the Temple Hills property in Provo, Utah (Tr. 25.).[1] In order to raise capital, appellant pre-sold condominiums that he planned to build on the property to a number of buyers (Tr. 27-28).[2]

The date of investment by each person named in the information, the amount invested and the date appellant deposited their funds into his own checking account are as follows:

Count	Investor	Amount Invested	Date of Investment	Date deposited into Appellant's checking account
I	Yalden	$7,333.33	11-6-79	12-18-79
II	Jolley	$30,000.00	8-27-79	8-31-79
III	Smith		8-31-79	
IV	Smith	} $33,000.00(total)	8-31-79	} 9-4-79
V	Smith		8-31-79	
VI	Smith	$5,333.33	11-6-79	12-18-79
VII	Barlow	$22,000.00	9-5-79	9-10-79
VIII	Pace	$11,000.00	8-31-79	9-4-79

See Second Amended Information; Exhibits 7, 47, 73.

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[1] "Tr." refers to the three volumes of transcript, successively paginated, which contain most of the trial proceedings. "P. Tr." refers to a partial transcript of trial containing most of the testimony of two witnesses, i.e., Rod Bullock and G. David Smith. "N. Tr." refers to the separate volume of transcript containing the motion for new trial. "S. Tr." refers to the separate volume of transcript containing the sentencing hearing.

[2] A total of 29 units were pre-sold by appellant or his representatives for the Temple Hills Condominium Project between August 21, 1979, and April 30, 1981. See Exhibit 7.

Upon receipt of the buyers' money, appellant did not place their money in trust, but almost immediately deposited the funds into his general real estate operating account with other unrelated monies over which he had sole control (Tr. 28-29). Two witnesses from the Department of Business Regulations testified that appellant acted improperly under State law by not immediately placing the buyers' money in a trust account (Tr. 1, 11-15, 831-833, 838-840).

While certain expenditures were made for the Temple Hills project from appellant's checking account, other expenditures unrelated to Temple Hills were also made from those accounts. Both witnesses from the Department of Business Regulations testified that the trust account requirement precluded appellant from spending the buyers' funds on matters other than Temple Hills (Tr. 12, 831). By April 29, 1980, virtually all of the money given to appellant had been spent by him. None of the buyers received their investment back in the Temple Hills project (Tr. 28-29). The background of these events is detailed below.

Before selling any condominium units, Michael Crockett, an experienced real estate developer and principal in Sunwest II, suggested to appellant that the Earnest Money Agreements should contain a non-refundability clause for the buyers down payment in order to provide the developers with some freedom to use the money (Tr. 30, 46-47, 60-61, 66, 71, 86).[3] Despite the

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[3] Crockett was not charged with any criminal offense.

non-refundability clause, Crockett said he believed the buyers' money needed to be held in trust or escrow. He also testified that he did not know their money was being used by appellant for non-Temple Hills purposes (Tr. 48-49, 66, 93-94).[4] After appellant acquired an interest in the land, he retained Rod Bullock, a real estate agent for Martensen Real Estate which had sold appellant the property, as the exclusive listing agent for future condominium sales (Tr. 99). In order to raise capital, it was decided to offer a number of buyers an investment inducement in the form of a discount off the purchase price of a condominium equal to the actual amount of money they invested (Tr. 103).

In return for their discount, Bullock understood that the buyers' money was non-refundable. Bullock maintained, however, that prior to any purchase appellant expressly told him and several buyers, including the Barlows and Jolleys, that their money would be held in a trust account, and would be used as needed only in the Temple Hills project (Tr. 111; P. Tr. 7-8, 10, 13, 15-16, 22).

Six of the eight counts in the information related to purchases made by, or through, David Smith, a licensed real estate agent. Mr. Smith invested approximately $38,000.00 of his

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[4] On cross examination, Crockett waivered on these points. For example, he conceded that he personally received some of the buyers' money as a consultant's fee, and was aware that appellant used at least some buyer money on other unrelated projects (Tr. 88, 90). The unrelated expenditures were permissible, according to Crockett, to strengthen appellant's financial qualifications for funding the Temple Hills Project (Tr. 91-92).

own in the project (P. Tr. 34-44.) While Smith knew that his down payments were non-refundable, he said that appellant told him before investing that the money would be placed in trust and used exclusively in the project (P. Tr. 41-56).

Mr. Smith also brought Jack Yalden and Heber Pace into the project (Tr. 121-122, 143-149). Mr. Yalden invested based upon appellant's representation to him that the money would be held in trust and used only for Temple Hills (Tr. 121-124). Mr. Pace also understood from discussions with appellant and Smith that his money would be held in trust and used only in the Temple Hills project (Tr. 146-149).

Like the other buyers, Joel Barlow and J. Arben Jolley also purchased units based on appellant's alleged representations, prior to purchasing, that their money would be placed in trust and used solely on Temple Hills (Tr. 161-164, 171, 178-182).

Three other buyers not named in the Second Amended Information also testified on a restricted basis concerning their purchases.[5] According to these individuals, appellant represented to them prior to purchasing that their money would be held in trust and/or used solely on the Temple Hills project (Tr. 198, 203-208, 265, 267-270, 281, 284-287).

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[5] The individuals were Martha Browning, Norman Carlson and Sara Yates. Pursuant to court order, these buyers were not permitted to testify with the same breadth as those named in the information to avoid prejudice to the defendant from evidence of alleged other crimes for which he was not charged (Tr. 255-263).

After the buyers made their investments, appellant obtained a loan in the fall of 1980 for $400,000.00 from FMA Finance which was secured by the Temple Hills Property. The majority of the loan ($300,000.00) was used to pay off the land while about $100,000.00 was deposited into appellant's operating account and was used for some of his other business ventures (Tr. 26-27). Appellant also used some of the buyers' money for his other projects including a shopping mall and mining venture (Tr. 305-306, 317-324, 344-347, 391-394, 428-442).

After appellant obtained the FMA loan, he tried to secure construction financing from a number of lenders including Citizens Bank. Negotiations continued during 1981 and 1982. The efforts ultimately failed because Citizens' officers did not feel he had met their loan commitment conditions (Tr. 445-454; Exhibits 43 and 45).

After Citizens turned appellant down, he defaulted on the FMA loan in March 1982 and the property was sold (Tr. 27, 454).[6] By April 29, 1980, appellant had essentially spent all of the buyers' money (Tr. 505-507).[7]

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[6] The property was sold to a group of investors headed by David Smith (Tr. 462-463). The Smith group eventually forced appellant into involuntary bankruptcy under Chapter 11. (P. Tr. 53).

[7] To support this conclusion, an investigator with the Utah County Attorney's Office, analyzed appellant's checking accounts from August 1979 through selected periods in 1980 (Tr. 500-503; Exhibit 47 and 48). This analysis was largely undisputed and, in fact, appellant's own analysis showed essentially the same thing. See Exhibit 73.

B. The Defense Evidence.

Appellant's defense focused on his belief that, based on the non-refundability clause in the Earnest Money Agreements, he could fully use the buyers' money as his own upon receipt. Appellant maintained that he never concealed his intent to do so. To demonstrate that point, Harold Paulos said that he received approximately $2,000.00 a month as consulting fees which he knew came from buyer funds. He also knew that buyer money was being spent by appellant on other projects in order to strengthen his financial qualifications for construction funding (Tr. 522-529, 551, 555). Mr. Paulos testified that appellant worked tirelessly on the project even though at one point appellant thought he would receive nothing out of his continued involvement (Tr. 617-619).

Chad Bauer was a real estate salesman in 1980 who had numerous discussions with appellant about the Temple Hills project (Tr. 628, 630-631). According to Mr. Bauer, appellant never waivered in his openly expressed belief that he could use the buyers' money for unrelated purposes from the moment they gave their money to him (Tr. 631-638).

Appellant testified in his own defense. After several years as a real estate broker, appellant decided to enter the real estate development field (Tr. 666-667). His first project was Temple Hills which was brought to him in May 1979 by Michael

Crockett and Rod Bullock (Tr. 668-674). At the time he acquired the land from Martensen Real Estate, he was told that it had already been accepted by Provo for a 50-unit condominium project. He later learned that the approval was not final (Tr. 679-686). After considerable problems and delays, appellant obtained final city approval in February 1980. He renegotiated the payoff amount on his contract with Martensen because of the unanticipated difficulties with the City (Tr. 686-687).

As a real estate broker, appellant was familiar with the requirements for real estate trust accounts. Appellant readily admitted that he did not, and never intended to, put the buyers' money in a trust account. Appellant explained that he believed the non-refundability clause in paragraph 1 of the Earnest Money Agreements made the normal trust requirements inapplicable. For that reason he never told anyone that his money would be placed in trust. Similarly, at no time did appellant ever intend to spend the money only on Temple Hills and, thus, never told the buyers anything to the contrary (Tr. 737-742, 775-781).[8] Appellant emphasized that one of the main purposes of the

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[8] Appellant said that Jack Yalden did not ask any questions in his brief meeting since Yalden was brought there by Smith who already knew how the project would work (Tr. 748-749). Moreover, appellant distinctly recalled telling Mrs. Browning that the money would be spent and not held in trust. He indicated that he assumed Barlow knew the same. Appellant said he never even met Mr. Pace and never told Mr. Yates that the money would only be spent on Temple Hills (Tr. 755-761).

pre-sell program was to strengthen his financial portfolio and increase his net worth so he could qualify for construction financing on the development (Tr. 728-730, 747).[9]

C. Motion for New Trial

Appellant, through new counsel, filed a motion for new trial and a motion for additional time to prepare for a hearing on the new trial. (See Motion for New Trial; Motion for Additional Time to Submit Memorandum, at pp. 197-201 of the record on appeal.) On January 11, 1985, the Court held a hearing on the motion. At the hearing, appellant's new counsel indicated that more time was needed to obtain the trial transcript and gather evidence for the Court to assess fully the ineffectiveness of his trial counsel in not presenting certain facts at trial. Although the Court did not have a specific factual record concerning trial counsel's

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[9] Appellant felt that he had a firm loan commitment by the end of 1981 from Citizens Bank. He indicated verbal approval was given on September 15, 1981, and recalled that he and Mr. Paulos were elated over finally obtaining a construction loan (Tr. 693-698). He distinctly recalled a meeting with Cleo Hanson of Citizens Bank in March of 1982 to finalize satisfying the loan conditions. In appellant's view, the only condition that posed a problem at the time was delivery of a title insurance policy on the land because a lis pendens had been filed by the Smith investor group tying up the property. This group would not release its hold and eventually took over the property (Tr. 700-705).

purported ineffectiveness, it ruled generally that trial counsel's failure to present evidence of which he was aware fell within the scope of trial strategy which was not a basis for a new trial (N. Tr. 5).

SUMMARY OF ARGUMENTS

Argument 1: There is no evidence to support appellant's conviction for theft under the government's sole prosecutorial theory of embezzlement. In the light most favorable to the government, the offense was committed, if at all, when the buyers parted with their money based on the claimed false representations by appellant. The latest possible date on which appellant could have spent the money he had received earlier is irrelevant. Subsequent use of money which has been fraudulently obtained is not an essential element of the offense, just as non-use is no defense. The government chose to proceed solely on an embezzlement theory with no evidentiary support in an effort to expand the time frame of the offense because it recognized that the only alternative basis for prosecution, theft by deception, was time-barred under Utah Code Annotated § 76-1-302. Therefore, the convictions must be reversed.

Argument 2. In addition to the basis for reversal above, the convictions must also be reversed because it is impossible to

tell from the verdict when the jury found appellant committed the offense, i.e., whether he committed the theft on the first or second date alleged in each count of the information, or sometime in between. Normally, the date when an offense is committed is not of the essence in an information. That general rule is only true, however, if the entire range of dates alleged is within the statute of limitations. There is an important exception where, as here, the government alleged, and the jury may have found, that the offense was committed on a date for which prosecution was time-barred. Because it is impossible to tell on which date, if any, the jury unanimously found the offense in each count was committed, the convictions must be reversed for a new trial.

Argument 3. The Court erred in denying appellant's motion for a new trial without holding an evidentiary hearing on the issue of the ineffectiveness of trial counsel. In the absence of an adequate record, the Court could not exercise its discretion. The total failure to exercise discretion constitutes an abuse requiring a remand for a full hearing on the ineffective assistance of trial counsel.

Argument 4. The monetary portion of the sentence was illegal because the Court imposed a fine and restitution on appellant

even though he had no financial ability to pay them, and ordered restitution for persons not named as victims in the information.

ARGUMENT

1. There was insufficient evidence to sustain the convictions for theft by embezzlement and prosecution for theft by deception was barred by the statute of limitations.

(a) There was no evidence for an embezzlement conviction.

On October 7, 1983, appellant was originally charged with theft by deception, in violation of Utah Code Annotated, § 76-6-405, and the government advised the Court that it intended to prosecute the case at trial on that theory. On September 10, 1984, only seven days before trial, the government filed a new information charging theft in violation of Utah Code Annotated, §76-6-404.[10] This information amended each count to allege, for the first time, that the theft occurred between a certain date in

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[10] See Appellate Record (A.R.) at 112-115. This "Second Amended Information" was filed, as required, pursuant to leave of court under Rule 4(d), U. R. Crim. P., which provides in part that the court may permit an information "to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced".

1979 (when each buyer invested) and April 29, 1980 (when appellant had spent all of the money).[11] The government abandoned its theft by deception theory, and indicated that it now intended to try the case on an embezzlement theory. A.R. at 97.

Despite the government's tactical maneuvering, there was no evidence at trial to support an embezzlement prosecution. The date of April 29, 1980, added to each count by the September 1984 information, was apparently chosen by the government in an effort to expand the time frame of the offense by claiming that it was not until then that appellant had spent all of the buyers' money he had earlier obtained by deception. This date, however, is legally immaterial to establish when the offenses were committed. The offense, if any, was committed when the buyers claim

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[11] See A.R. at 74-81, 93. The original information filed in Eighth Circuit Court contained five counts which corresponded by investor to counts 1-3, 7 and 8 of the Second Amended Information, but did not plead a range of offense dates in each count.

Before appellant's initial appearance, another information, styled an "Amended Information", was filed in Eighth Circuit Court on October 27, 1983, without leave of court as required under Rule 4(d), U. R. Crim. P. This information alleged theft in violation of Utah Code Annotated, §76-6-404. A.R. at 67-71. It added four new counts which corresponded by investor to counts 4-6 and 9 of the Second Amended Information. Like the first information, this information did not include a range of dates for offense commission. After a preliminary examination on January 18, 1980, in Eighth Circuit Court, two counts of the amended information, not at issue here, were struck. On January 24, 1980, the amended information, as modified at the preliminary hearing, was filed in Fourth District Court. A.R. at 67.

appellant caused them to invest by falsely representing his intent to put their money in trust and use it only on Temple Hills.

There is no evidence that appellant's intent to keep their money, whether in good faith or fraudulent, was not formed until April 29, 1980. The evidence, in fact, was all to the contrary. Every buyer called by the government testified that, at the time they invested, appellant represented to them their money would be held in trust and/or only spent on the Temple Hills project.[12] Accepting their testimony, these representations were false, when made, causing the buyers to part with their money. This offense is, at best, theft by deception under Utah Code Ann. §76-6-405. It was committed and complete, if at all, when appellant obtained the money by deception. State v. Lakey, 659 P.2d 1061 (Utah 1983); State v. Forshee, 588 P.2d 181 (Utah 1978); State v. Taylor, 378 P.2d 352 (Utah 1963); See State v. Saylor, 618 P.2d 1166 (Kan. 1980) (Kansas statute nearly identical to Utah's).

As already noted, the government recognized that prosecution was time-barred for theft by deception and filed the September 1984 information alleging theft generally, under Utah Code Ann.,

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[12] See testimony of David Smith (P. Tr. 41-56); Jack Yalden (Tr. 121-124); Heber Pace (Tr. 146-149); Joel Barlow (Tr. 161-164); Joseph Barlow (Tr. 178-182); Martha Browning (Tr. 203-208); Norman Carlson (Tr. 267-270); and Sara Yates (Tr. 284-287).

§76-6-404, in an apparent attempt to expand the time frame of the offense by prosecuting the theft on an embezzlement theory. The facts, however, simply do not support the government's theory. Faced with a strategic decision,[13] the government chose to ignore the critical distinction made by this Court between theft by deception and embezzlement in State v. Taylor, supra:

> Fundamental in the nature of embezzlement is the coming into possession of property honestly, "by virtue of one's trust," and then converting it to one's own use in violation of that trust. This is in contrast to situations where, as here, the essential wrong is committed in obtaining possession of the property. Where the intent to take the property is formed before the taking, and is coupled with some deception or trick to acquire possession of the property, the crime is not embezzlement. One could not embezzle that which he had already stolen. Since the State did not prove the charge upon which the conviction is grounded, it is reversed.

378 P.2d at 354 (footnotes and citations omitted) (emphasis added). See Moore v. United States, 160 U.S. 268, 269 (1895); United States v. Trevino, 491 F.2d 74, 75 (5th Cir. 1974) (embezzlement and theft are inconsistent since embezzlement

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[13] The government's choice was either to prosecute an offense for which there was arguably some evidence, i.e., theft by deception, but for which the statute of limitations had clearly run, or, alternatively, pursue multiple counts on an embezzlement theory of prosecution with no evidentiary support.

presupposes lawful, honest possession while theft does not); State v. McCormick, 442 P.2d 134 (Ariz. 1968).[14]

The government elected to proceed solely on an embezzlement theory without any evidence to support it. It did so because, as discussed below, prosecution on the alternative theory of theft by deception was clearly time-barred.

b. The statute of limitation had run on theft by deception.

The appropriate statute of limitations, Utah Code Ann., §76-1-302, requires that a felony prosecution must be commenced within four years from the time the offense is committed. Thus, for investments made in 1979 based on alleged false representations, the statute of limitations had clearly run in 1983 unless the thefts were somehow not committed until 1980.

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[14] While consolidation is not an issue here, it is worth noting that in order to avoid the technical pleadings problems presented by such cases as Taylor, the Utah legislature adopted consolidated theft provisions embracing a number of larceny-type common law offenses into a single statutory offense in 1973. See Utah Code Annotated, §76-6-403. Even after statutory consolidation, of course, the government must still prove that the offense was committed in some manner. See State v. Seekford, 638 P.2d 525, 526-27 (Utah 1981); see also, State v. Saylor, supra, 618 P.2d at 1169-1170. Further, consolidation is immaterial when there is no evidence for one of the offenses or the statute of limitations has run. For example, a prosecution could proceed on alternative theories of theft or receiving stolen property if it was not clear whether the defendant actually stole or simply received the property, as long as there was some evidence to convict on either theory. If, however, the statute of limitation had run on the theft, but not on the later receipt, the government could not mesh the two offenses in order to avoid the time bar. In that case, the government would be required to prove that the defendant received the property, not stole it, to avoid the statute of limitations.

Whether one accepts the government's theory that appellant made misrepresentations when he took the buyers' money, or appellant's position that he did not, it is clear that appellant never intended to place the buyers' money in trust and always intended to use at least some of it on non-Temple Hills projects. Thus, appellant's intent to keep the money was formed and complete on the date when each buyer invested his money, i.e., on the first date of each count in the information.[15]

No theory of theft depends upon whether a defendant actually spends or disposes of the money he has stolen or embezzled. In fact, the crime is complete when the defendant has the intent to keep the money regardless of what, if anything, he does with it after the crime. See State v. Lakey, supra; State v. Taylor, supra; United States v. Mack, 525 F. Supp. 382 (N.D. Tex. 1981) (money stolen, not embezzled, when defendant received funds with previously formed intention of appropriating it to her own use); United States v. Goldsmith, 274 F. Supp. 494 (E.D. Pa. 1967) (embezzlement complete once owner deprived of ownership); United States v. Mosley, 507 F.2d 257 (8th Cir.), cert. denied, 420 U.S. 991 (1974) (wrongfully taking is the touchstone of embezzlement, not further disposition); United States v. Powell, 294 F. Supp.

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[15] The latest date on which even embezzlement could have been committed, under the government's flawed embezzlement notion, was when appellant failed to place the buyers' money in trust but, instead, put it in his own checking account over which he had sole control. As the chart on page 4 shows, this would not affect the statute of limitations argument.

1353 (E.D. Va.), aff'd, 413 F.2d 1037 (4th Cir. 1969) (embezzlement does not depend on disposition of property).

A pair of distinctly different hypotheticals illustrate this principle of law. Take, for example, a bank teller who embezzles $1,000.00 from the bank's till on January 1. The teller has embezzled funds at that time even if the money is spent one, five or ten years later. Indeed, the crime has been committed even if the teller never spends the money and returns it to the bank at a subsequent time. Modifying those facts slightly, but critically, the same bank teller may embezzle money from the bank's till continually at the rate of $100.00 a month until a total of $1,000.00 has been embezzled.

In the first case, there was one completed theft at the time the teller took the $1,000.00 regardless of how, when, or whether he ever spent or returned the money. In the second hypothetical, the teller committed a series of thefts over a period of time.

In the instant case, appellant took each buyer's money at one specific time even though he spent it over a period of time. The crime, if any, was complete when each buyer parted with his money based on the claimed false representations. There is absolutely no evidence at all to the contrary.

c. The government failed to prove the offense was committed within the statute of limitations.

It is well-established that criminal statutes of limitation are jurisdictional and must be construed liberally in favor in of

the accused and strictly against the government. See, e.g., Toussie v. United States, 397 U.S. 112, 115 (1970); State v. Eilts, 596 P.2d 1050 (Ct. App. Wash. 1979); Padie v. State, 557 P.2d 1138 (Alaska 1976); People v. Zamora, 557 P.2d 75 (Cal. 1975); State v. Fogel, 492 P.2d 742 (Ct. App. Ariz. 1972); Cunningham v. District Court of Tulsa County, 432 P.2d 992 (Ct. Crim. App. Okla. 1967).

Ordinarily, of course, the date of an offense is not essential in pleading a crime as long as prosecution has been brought within the statute of limitations. See State v. Bundy, 684 P.2d 58 (Utah 1984); State v. Tacconi, 171 P.2d 388 (Utah 1946); State v. Distefano, 262 P. 113 (Utah 1927). This is true, however, only when "[n]o contention is made that the statute of limitations may have run". State v. Bundy, 684 P.2d at 62; State v. Fergusen, 558 P.2d 1092, 1095 (Kan. 1976) (time unessential since no statute of limitations involved).

There is an important exception to the general rule if it appears from the facts that the statute of limitations may have run. In that case, as here, the government must prove beyond a reasonable doubt that the offense was committed within the time permitted by the statute of limitations. See, e.g., Grunewald v. United States, 353 U.S. 391, 414-415; State v. Young, 440 N.E.2d 1379, 1381 (Ct. App. Ohio, Hamilton County 1981); United States v. Wolf, 407 F. Supp. 731 (E.D. Mo. 1975); People v. Kohut, 282 N.E.2d 312, 315 (N.Y. 1972); State v. Newton, 81 P. 1002 (Wash. 1905).

The facts in this case demonstrate that the offense was committed, if at all, when appellant made the misrepresentations to the buyers and took their money with the intent to exercise complete control over it, i.e., at the time of the investment. Prosecution was commenced under the Second Amended Information more than four years beyond that date and is time-barred. Therefore, the convictions must be reversed.

2. The jury verdict is ambiguous regarding the statute of limitations.

In an apparent attempt to avoid the statute of limitations bar, the government filed a "Second Amended Information" which added a range of dates ending with April 29, 1980, to each count. As already demonstrated, however, the addition of this date on which appellant ran out of money bears no relationship to when the offense may have been committed and must be rejected. This is not to suggest that how appellant spent the money was not arguably relevant to his earlier intent at the time he took it. Such subsequent use was not an element of the crime, however, and cannot extend the statute for an offense which has already been committed.

Most importantly, the information, as framed with a range of dates, included dates for which prosecution was barred and some for which it was not. This necessarily led to an ambiguous jury verdict regarding when appellant had the criminal intent to

commit the offenses, i.e., at the time he took the buyers' money or when he finally spent all of it. If the jury, or some of them, found that appellant had such intent on the first date alleged in each count, then the offenses would be clearly time-barred. If, on the other hand, the jury, or some of them, found that such intent was not formed until the money was finally spent, then the offenses would not be time-barred.[16]

It is likewise possible that some, or all, of the jurors found appellant formed the intent to keep the buyers' money somewhere in between the beginning and ending dates in each count. It is simply impossible to tell for which, if any, of these alternatives the jury found appellant guilty. That is why the date of offense is critical in this case.

The jury verdict in this case does not reflect when the jury unanimously concluded appellant committed the offenses. Indeed, whether they ever so concluded is in doubt. For example, count 2 alleged that the offense was committed "on or between August 27, 1979, and April 29, 1980". The jury may have found that the offense was committed on August 27, 1979, in which case prosecution was barred. Or, it might have found the offense was committed on April 29, 1980, in which case there was no evidence to support it. To add to the confusion created by the

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[16] As already demonstrated, such a finding would have had no factual foundation because there was no evidence from which a jury could have possibly concluded appellant's intent to keep the money was not formed until after the buyers had invested.

government, four jurors may have felt that the offense was committed on August 27, 1979, while four others may have felt the offense was committed on April 29, 1980. Thus, the jury may have found appellant guilty on this count even though there was no unanimity on this critical element.

Because it cannot be determined from the verdict whether the jury unanimously agreed that appellant committed the offenses within the statute limitations, its verdict is ambiguous and must be reversed for a new trial. See Grunewald v. United States, supra, 353 U.S. at 414-415 (convictions reversed where it was impossible to tell whether jury found all necessary elements were committed within statute of limitations); State v. Tacconi, 171 P.2d 388 (Utah 1946) (conviction reversed where insufficient evidence to establish commission of offense within statutory period).

As one Court of Appeals noted:

> When one is charged with having committed a crime by several methods and there is a deficiency of proof as to one or more of those methods, the court must set aside the verdict unless it can ascertain that the jury founded its verdict upon one of the methods with regard to which substantial evidence has been introduced. State v. Carothers, 84 Wash. 2d 256, 525 2d 731 (1974). There is no indication that the jury returned special verdicts or made special findings. The jury was instructed that in order to convict Mr. Vandenburg it had to agree unanimously as to any one of the alternative modes by which the crime has been charged. The jury may properly have convicted upon the basis of either or both of the other alternative modes. From a general verdict, however, we cannot ascertain upon which alternative mode the jury agreed unanimously. Accordingly, we must reverse the judgment and remand the case for new trial.

State v. Vandenburg, 544 P.2d 1251 (Ct. App. Wash. 1976). Put differently, where evidence is defective on one of two alternatives for guilt in the same count, the ambiguity of the verdict requires reversal. See United States v. Natelli, 527 F.2d 311, 325 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976).

In the present case, the prosecution did not proceed on alternative theories. In fact, the government deliberately abandoned prosecution for theft by deception seven days before trial, when it filed the new information, in order to gain the substantial tactical advantage of multiple charges under an insufficient embezzlement theory. Based on the government's tactics, appellant had no opportunity to, and did not, defend against the abandoned theft by deception alternative.

The problem was compounded because the jury was not instructed that it had to agree unanimously on the date of the offense. For example, in jury instruction number 7 (A.R. at 149-150), the jury was told only that one of the essential elements of the crime in each count included the exercise of unauthorized control "on or about the respective dates stated in each count of the information". The instruction given did not address the problem presented here because it did not explain that, under the circumstances of this case, the jury must unanimously agree on when appellant committed the crime.

The jury verdict is fatally ambiguous and appellant's convictions must be reversed.[17]

3. The Court erred in denying the motion for new trial without allowing new counsel time to prepare an adequate record.

The Court held a hearing on appellant's new trial motion before new counsel obtained the transcript to present a rational and supportable basis for new trial based on fact. Further, counsel requested additional time, under Rule 24(b), and stressed that many of the matters intended to be raised on the motion were matters outside the record, going to trial counsel's overall ineffectiveness.

There was no way for the Court to exercise its discretion in the absence of an adequate record. The Court's failure to exercise discretion constituted an abuse. The reason is clear in this case. There is now nothing for this Court to review in a meaningful manner because an adequate record was not made in disposing of the motion. At a minimum, this matter must be reversed and remanded for a full fact hearing regarding the effective assistance of trial counsel.

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[17] While this Court could remand for a new trial, any attempt to retry appellant on the same facts using a different theory, i.e., theft by deception, raises serious double jeopardy questions. See Greene v. Massey, 437 U.S. 19 (1978); Burks v. United States, 437 U.S. 1 (1978).

This was not a case of new counsel's failure to prepare; it was a question of not having time to do so. The Court apparently believed there was nothing that trial counsel could have failed to do that would not fall within the realm of unassailable trial strategy (See N. Tr. 5). With due respect to the trial court, appellant should have had a meaningful opportunity to present evidence outside the record concerning the ineffective assistance of counsel so the Court could have exercised its discretion. This Court could then have provided meaningful review of the lower court's decision. Trial counsel's effectiveness and preparation were particularly crucial in this case where the trial court itself noted that it "may have voted differently than the jury if [sic] were on the jury" (S. Tr. 10). The matter should be remanded for a full evidentiary hearing on a motion for new trial with adequate time for new counsel to present evidence and affidavits in support of the motion.

4. The Court erred in ordering appellant to pay a fine and make restitution.

Despite being advised at sentencing that appellant could not repay the buyers, the Court imposed a fine on appellant and ordered restitution without an inquiry into his ability to pay (S. Tr. 6-7). This Court has noted that fines and restitution are generally disfavored for defendants who lack the ability to pay. State v. Peterson, 681 P.2d 1210, 1222-1223 (1984)

(Stewart, J. concurring). See also, Moore v. United States, 150 F.2d 323, 325 (10th Cir. 1945).

In addition, there are several procedural and substantive infirmities in the Court's ordered restitution. For example, the Court did not make its reasons for ordering restitution a part of its written order, nor did it indicate that it considered the various criteria specified by law. See Utah Code Ann., §76-3-201(3).[18] Further, the restitution ordered by the Court

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[18] Section 76-3-201(3) provides in part:

> (a) When a person is adjudged guilty of criminal activity which has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution up to double the amount of pecuniary damages to the victim or victims of the offense of which the defendant has pleaded guilty, is convicted, or to the victim of any other criminal conduct admitted by the defendant to the sentencing court unless the court in applying the criteria in Subsection (b) finds that restitution is inappropriate. If the court determines that restitution is appropriate or inappropriate, the court shall make the reasons for the decision a part of its written order.
>
> (b) In determining whether or not to order restitution, or restitution which is complete, partial, or nominal, the court shall take into account:
>
> (i) The financial resources of the defendant and the burden that payment of restitution will impose, with due regard to the other obligations of the defendant;
>
> (ii) The ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;. . .

appears to contemplate restitution to alleged victims of offenses for which the appellant was neither charged, nor convicted, or admitted his guilt in clear violation of §76-3-201(3)(a). To the extent that the restitution order was meant to encompass such alleged victims, its scope is clearly invalid.

The manner of enforcement for appellant's failure to pay the fine and restitution is also unclear under the court's order. Normally, a defendant who fails to pay a fine or make restitution, which he has the ability to do, may be sentenced to additional unspecified imprisonment for contempt of court. See Utah Code Ann., §76-3-201.1(2). In the instant case, the overly broad restitution order and the Court's failure to comply with the substantive and procedural provisions of the law, coupled with appellant's potentially indefinite imprisonment for contempt, collectively raise serious constitutional questions against imprisonment for debt. See Utah Const., Art. I §16; Harris v. Harris, 377 P.2d 1007 (Utah 1963).

This Court does not need to reach these constitutional issues, but instead should remand the matter for a full hearing on whether appellant has the ability to pay the fine and restitution with instructions that restitution may in no event exceed the actual pecuniary damages of the people named in the information. See Utah Code Ann., §76-3-201(4)(b).

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	CERTIFICATE OF HAND DELIVERY
vs.	:	
PHILLIP G. SNYDER,	:	
Defendant-Appellant,	:	Case No. 20470

I do hereby certify that four true and correct copies of Appellant's Brief were hand-delivered this 31st day of January, 1986, to the Utah Attorney General's Office at 236 State Capitol Building, Salt Lake City, Utah.

Neil A. Kaplan

CONCLUSION

Appellant requests the following relief:

1. Reversal of his conviction on all counts because the evidence was insufficient for embezzlement and prosecution is time-barred for theft by deception.

2. In the alternative, reversal and remand for new trial on all counts because it was impossible to tell whether the jury found appellant committed an offense within the statute of limitations.

3. In the alternative, a remand for hearing on appellant's motion for new trial based on the ineffective assistance of trial counsel.

4. In the alternative, a remand for a hearing on appellant's ability to pay the fine and restitution as well as on the scope of the ordered restitution.

WHEREFORE it is respectfully submitted that appellant's convictions should be reversed.

RESPECTFULLY SUBMITTED this 31 day of January, 1986.

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